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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1416

LYDIA AGUAYO, RUTH BOWEN, HELEN POSNER, EDNA VEAL, NILSA SANTANA, and HYACYNTH CADOGAN; individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

—and—

CITY OF NEW YORK and JULE SUGARMAN, Commissioner of the Department of Social Services for the City of New York,

—and—

UPSTATE WELFARE RIGHTS ORGANIZATION, CITYWIDE COORDINATING COMMITTEE OF WELFARE RIGHTS GROUPS, ROCKLAND COUNTY WELFARE RIGHTS ORGANIZATION, BROOKLYN WELFARE ACTION COUNCIL, WELFARE RECIPIENTS ACTION GROUP OF RED HOOK, SUNSET PARK WELFARE RIGHTS ORGANIZATION, and UNITED WELFARE LEAGUE,

Petitioners,

—against—

ELLIOT R. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JOHN D. TWINAME, Administrator, Social and Rehabilitation Service; and ELMER SMITH, Regional Commissioner, Social and Rehabilitation Service; individually and in their official capacity; and THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

—and—

ABE LAVINE, individually and in his official capacity as Commissioner of Social Services of the State of New York; and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UPSTATE WELFARE RIGHTS ORGANIZATION, *et al.*,

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ABE LAVINE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This case involves the operation of two experimental projects which are designed to deprive some 88,000 families in New York State of benefits and rights to which they are otherwise entitled under state and federal welfare law. Petitioners respectfully request the issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered on January 18, 1973, which affirmed the district court's denial of a preliminary injunction against implementation of these projects.

Opinions Below

The opinion and order of the district court, dated October 16, 1972, denying the motion for a preliminary injunction, is not reported, but is set forth in Appendix A to this petition.

The opinion of the Court of Appeals, dated January 18, 1973, modifying and affirming as modified the district court's decision, is not reported, but is set forth in Appendix B to this petition.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does the imposition by administrative officials of substantial burdens on and conditions for the receipt of statutorily prescribed public assistance benefits, only on families living in certain geographic areas of the state, selected *solely* for purposes of experimentation designed to determine the effect of such requirements on welfare recipients' behavior and public attitudes, violate the Equal Protection Clause of the Fourteenth Amendment?

2. Does §1115 of the Social Security Act authorize the Secretary of Health, Education and Welfare to permit a state to operate an experimental project in the public assistance program which deprives eligible individuals of rights and entitlements established under the federal and state statutes governing such public assistance program,

particularly where the scheme to be "tested" is a radical departure from the fundamental Congressional approach to such program and where identical experiments were previously tested in 12 states pursuant to specific Congressional authorization which was *repealed* after Congressional analysis of the results of those experiments?

3. Was the court below justified in applying as it did a less stringent standard for Secretarial action under §1115 of the Social Security Act, and for judicial review of that action, than was established by this Court in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1972), solely because the administrative determination in question related to welfare experimentation, and did the Secretary of HEW's approval of the two experimental projects constitute a lawful exercise of his authority under §1115 when measured by the standards prescribed in §706 of the Administrative Procedure Act as interpreted by this Court in *Overton*?

Statutes Involved

Section 1115 of the Social Security Act, 42 U.S.C. §1315, provides as follows:

> "In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of title I, X, XIV, XVI, or XIX, or part A of title IV, in a State or States—
>
> (a) the Secretary may waive compliance with any of the requirements of section 2, 402, 1002, 1402, 1602, or 1902 as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project, and

(b) costs of such project which would not otherwise be included as expenditures under section 3, 403, 1003, 1403, 1603, or 1903 as the case may be, and which are not included as part of the costs or projects under section 1110, shall, to the extent and for the period prescribed by the Secretary, be regarded as expenditures under the State plan or plans approved under such title, or for administration of such State plan or plans, as may be appropriate.

In addition, not to exceed $4,000,000 of the aggregate amount appropriated for payments to States under such titles for any fiscal year beginning after June 30, 1967, shall be available, under such terms and conditions as the Secretary may establish, for payments to States to cover so much of the cost of such projects as is not covered by payments under such titles and is not included as part of the cost of projects for purposes of section 1110."

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706, provides in pertinent part as follows:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;

(D) without observance of procedure required by law; . . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Statement of the Case

This case challenges the right of state and federal agencies to compel destitute families to submit to being used as guinea pigs in an experiment which relates to the very means of their subsistence. The 88,000 families involved are all recipients of public assistance under the federally-funded Aid to Families with Dependent Children Program (AFDC), Title IV-A of the Social Security Act, 42 U.S.C. §601-610, in New York State, and it is this very dependence upon the state for the basic necessities of life which provides the opportunity for the exercise of compulsion. Thus, the U.S. Department of Health, Education and Welfare (HEW) and the New York State Department of Social Services (the state agency) are imposing numerous and burdensome conditions on the receipt of public assistance by such families which both agencies admit may not lawfully be imposed under Title IV of the Social Security Act (hereinafter Act), 42 U.S.C. 601, *et seq.* These conditions are being imposed in the name of experimentation under the aegis of two projects, Public Service Work Opportunities (PSWOP) and Incentives for Independence (IFI) submitted by the state agency and approved by HEW on the purported authority of §1115 of the Act. Families in the

selected project areas are compelled to participate in the projects. If they fail to satisfy the additional project conditions their assistance grant is drastically reduced even though they meet all the conditions of eligibility which may lawfully be applied in the regular statewide AFDC program and which govern the eligibility of all families in the state living outside the project districts.[1]

Obviously the imminent risk to these hundreds of thousands of citizens alone demonstrates the need for a careful and searching inquiry into the basis for and manner of HEW's action. Moreover, a similar project has been approved in California, and the Secretary of Health, Education and Welfare has recently announced that he intends to make even wider use of his authority to approve projects in order to give states greater "flexibility" in the administration of the AFDC programs, i.e., freedom to operate programs on terms and conditions other than those established in Title IV of the Act. White House Press Conference of Caspar Weinberger, March 1, 1973, pp. 4-5.

The PSWOP project, which covers the full 88,000 families (over 25% of the state's AFDC caseload), will operate in the Counties of Albany, Cattaraugus, Chemung, Franklin, Greene, Nassau, New York, Niagara, Oneida, Orange, Richmond, Rockland, St. Lawrence and the Bay Ridge Center in Brooklyn (Kings County). 60,000 of these 88,000 families live in New York City. Under this project, mothers of

[1] The current standard of need used for determining eligibility for AFDC is based on the *1968* prices of those items which the state has determined to be necessary to maintain a bare subsistence level of living. See *Rosado* v. *Wyman*, 322 F. Supp. 1173 (E.D.N.Y., 1970). The grant paid equals only 90% of the standard of need, or 75% of actual need based on 1972 prices. The reduction for failure to fulfill the project conditions would reduce a family's grant well below this 75% level.

children who are 6 or older and those children who are 16 or older and not in school will be required to accept assignments to public agencies to "work off" their family's AFDC grant.[2] If a parent fails to meet this condition by either failing to satisfactorily fulfill a work relief assignment or otherwise failing to fulfill any of the preliminary steps such as reporting for placement, seeking out day care, etc., the family's grant is reduced by subtracting the amount attributable to her needs, e.g., a family of 4 would receive ¾ of a 4 person grant.

These are *not* "regular" jobs nor do they pay a "regular" wage. Although a mother is working the number of hours purportedly required for her to "earn" her family's low grant, she does not receive this amount as a salary for her labor.[3] The family merely continues to receive its assistance grant under all the conditions and requirements which otherwise attach to receipt of public assistance, e.g., the requirement that the parent report to the state employment office twice a month to pick up the assistance check, the requirement that the family admit agency workers to its home. No "extra" money can be earned by working extra hours; the "worker" receives none of the usual "fringe" benefits (e.g., social security or other retirement coverage, paid sick leave, vacation pay), since she is not considered an employee of the agency for which she works.

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[2] This is also known as "work relief" or "work for relief".

[3] An individual is assigned to work those number of hours which multiplied by the hourly rate assigned to such job for purposes of the project equals the assistance grant being paid to the family. For example, a mother with three children working off the average monthly payment for a family of 4, $310, at the hourly rate of $1.85 (the rate assigned to most "jobs" under the project) has to work 21 8-hour days a month, i.e., the full month.

The effect of the deprivation of rights accomplished by the projects goes far beyond the direct loss of benefits for those who fail to comply. Thus the loss of personal dignity felt by the petitioners at being compelled to accept work under conditions in which they are set apart in both fact and theory from their co-workers and marked as "second-class" workers whose labor is not worth the recognition or remuneration awarded to those accepted to work as regular employees, can never be compensated for after-the-fact. (See Affidavit of plaintiff Cadogan, Doc. 7.) They cannot even expect that their participation, as personally degrading as they may find it, might at least offer the chance of future financial improvement for their family, since the projects do not provide for any real job training, and do not even provide for their being hired into regular civil service jobs at the end of their participation under the project.[4]

Even more importantly to the mothers involved, the project threatens serious harm to their families. For example, they are being forced to place any child 6 or older in the care of any other person considered "adequate" by the welfare agency even where their parental judgment may be that such care will not be in the best interests of their children either because of the nature of the care

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[4] In contrast, the Public Service Employment program under the federally mandated Work Incentive Program for AFDC recipients, (WIN) (42 U.S.C. §602(a)(19), 630 *et seq.*) requires not only that the individual be paid a regular salary during her period of PSC employment but also that the employing agency must make "a firm commitment to hire participants as regular, full time, permanent staff within the 6-12 month period of [placement as] employment [under PSE]". WIN/Public Service Employment Guidelines, Department of Labor, Manpower Administration, ¶10.a, page 11 (1972).

offered or because of their conviction that their children's needs cannot be adequately met by any substitute care arrangement. Since quality day care, provided by personnel trained in child development programs, is wholly inadequate to meet the demands of these projects, day care under the projects will generally mean a "babysitter" who may, indeed, be considerably less qualified to care for the parent's child than the parent herself.

This is but one of the severe strains placed on the maintenance of petitioners' family lives by the many adjustments needed to accommodate themselves and their children to their working outside the home, while still continuing to carry all the burdens of parental guidance and responsibility in a family already strained by the absence of one parent and the constant burden of poverty. Ironically, the emotional needs of the children in such situations are often intensified and complicated by the very fact of the mother's absence from the home. The significance of this problem and the need for "strong personal supportive counselling" to "help [families] to cope with problems that exist in the family or arise because the mother is out of the home so much during her training or work" has been specifically recognized in WIN, the federal work and training program. HEW, Handbook for WIN, 1972, §90.1 *Counseling.* No provision is made for any such counseling in these projects.

Admittedly many mothers do choose to work and to accept all the risks and burdens to family life attendant thereto. As noted in Commissioner Sugarman's affidavit (Doc. 2) no doubt many mothers make this choice in the hope that any problems entailed will be offset by the benefits to their family of their increased income. Of course, no such benefit accrues to the families herein. Moreover, the very fact that

petitioners' total income continues to be at a bare subsistence level (unlike the employed mother who receives an income disregard) exacerbates all of the problems which they must meet and resolve in order to allow them to function as both mother and unpaid breadwinner.

PSWOP and its attendant burdens does not constitute the whole of the scheme to deny the benefits of the federal AFDC program to recipients in New York State. A second project, Incentives for Independence (IFI) which is being run in three of the fourteen areas covered by PSWOP, i.e., Rockland and Franklin Counties, and the Bay Ridge Center in Brooklyn, imposes even more additional burdens and sanctions inconsistent with the requirements of Title IV-A on some 8,000 of these families. (Approximately 6,000 of these 8,000 families live in New York City, so that the major impact of both projects is in the City.) These families will suffer an even larger monetary penalty than a pro-rata reduction of the family grant if a family member fails to fulfill the work relief conditions. In addition there is a diminution of the "work incentive" income disregard mandated by §402(a)(8), 42 U.S.C. §602(a)(8), for those lucky enough to find private employment.

Moreover, *children* 15 and older who are *full-time students* and therefore exempt from the work relief requirement are required to accept assignment to a "community service project" in a "youth motivation" program. Although the state lauds the desirability of these assignments as useful character builders and opportunities to earn extra money, i.e., $1.60 an hour, the teenagers are compelled to participate on pain of a reduction in the family's grant rather than being offered an opportunity to volunteer therefor. (Two "useful" projects identified thus far in

Rockland County are school cafeteria clean-up and basketball polishing for the school team.) Both parent and child are thus faced with a draconian choice. Should the teenager submit to an enforced servitude, albeit a paid servitude, or should he or she claim the same rights of choice reserved to "non-needy" students and by so doing cause a loss of bread on the family table?

Furthermore, under IFI, those *parents* whose children demonstrate a truancy "problem" will be forced to *participate in group counseling* run by the *welfare agency* and to accept a plan for dealing with the child's "problem" formulated by such agency. Parents of non-poor children with identical "problems" are, of course, not subject to such mandatory counseling requirements and their children's school problems will be dealt with only through the educational system. Parents dependent on AFDC to meet their family's financial needs are thus required to accept direct governmental control over the performance of their parental functions as the price of receiving AFDC although the federal statute does not contemplate any use of the assistance grant as a means to control parental behavior or performance in non-financial matters. Cf. *King* v. *Smith*, 392 U.S. 309 (1968) at 320-330. These parents are not only deprived of their statutory right to receive financial assistance free of any such condition but are also thereby isolated from the rest of the community in terms of their parental rights and responsibilities and subjected to the indignity of being classified as less adequate parents than the parents of other students similarly "truant" whose families do not receive public assistance.

As noted above neither federal nor state legislature has determined that these particular AFDC recipients should

be subjected to these specific extra conditions. The scope and form of the projects is the combined product of two administrative agencies. Nonetheless, by approving these activities as projects under §1115 HEW is authorizing the state to require AFDC recipients to fulfill conditions which cannot be imposed on them under the federal statutes in order to continue to receive the full assistance benefits to which they are already entitled under such statutes. This effects a denial of federal statutory entitlements to all recipients in the project areas. Thus, under both PSWOP and IFI even those recipients who do not suffer a grant reduction because they fulfill the numerous additional burdensome conditions imposed, are denied the benefit of receiving their assistance subject only to those terms and conditions imposed by the Congress of the United States.

HEW issued its purported approval of these projects on June 1, 1972 notwithstanding its concomitant admission that it did not yet have all the information as to the proposed method of operation under the projects which it considered to be necessary to determine their acceptability. (28a-30a).[5] After submitting some further materials which so far as appears from the record have not yet been reviewed or acted upon by HEW, the state agency, on or about July 1, instructed local districts to begin project operations by August 1.

On July 27, 1972, the state agency having determined that the projects would not be operative in New York City by August 1, instituted fiscal sanctions against the City notwithstanding the fact that its inability to proceed was due, *inter alia*, to the lack of sufficient staff and resources

[5] References to the Court of Appeals opinion set forth in Appendix B are indicated by —a.

to perform the project tasks and to the consistent failure of the state agency to provide the City with a cohesive and rational statement of the project scheme and the operations required thereunder. See Affidavit of Jule Sugarman, August 1, 1972, Doc. 2. Recognizing that implementation of the projects under such circumstances would cause severe dislocation and disruption of the City Department of Social Services and would jeopardize its ability to perform its ongoing statutory obligations by requiring a diversion of already over-burdened personnel from their responsibilities, the City determined that it could not properly go forward. In addition, implementation of the projects imposes severe financial costs on the City which will incur at the very minimum an incremental annual cost of $8¼ million.[8]

Moreover, the City is effectively being pulled between two inconsistent demands since HEW has already informed New York, in an action unrelated to its consideration of these projects, that it has reason to question the ability of the City agency to carry out its duties under the federally-funded assistance programs and that it has identified the probable sources of these problems as inadequacies of staffing and training. HEW is requesting prompt correction. Clearly, the result of adding additional tasks which involve the administration of numerous and complex new procedures to this already greatly overburdened system

[8] The City's original estimate of incremental costs prepared on July 10, 1972 had indicated an incremental cost of $3 million. However, the fiscal harm to the City has been substantially increased by changes in circumstances since these projects were approved on June 1, 1972, including the changes in the state work program in AFDC required by the subsequent action of the district court in *Dublino* v. *New York State Department of Social Services*, 348 F. Supp. 290 (W.D.N.Y., 1972), sub judice, O.T. 1972, No. 72-792, and the ceiling on federal reimbursement for service expenditures imposed by P.L. 92-512 enacted on October 20, 1972.

is foreordained and the City cannot possibly both carry on the projects and improve its performance under the regular program. Just as clearly the resultant harms will flow not only to the City, but to the very individuals whom the Department is supposed to serve.

The instant suit was filed on August 2nd by individual recipients subject to the requirements of the projects, welfare rights organizations whose members are subject to the project requirements, and the City of New York and its welfare commissioner. Petitioners alleged that the federal respondents' approval of the projects was not in accordance with the requirements of §1115 of the Social Security Act, and that the projects as designed deprived them of their constitutional rights to due process and equal protection of the laws. Their claims were thus based on the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* (with respect to the federal respondents), and the Civil Rights Act, 42 U.S.C. §1983 (with respect to the state respondents), and jurisdiction was invoked under 28 U.S.C. §§1331, 1343 and 5 U.S.C. §701 *et seq.*

A temporary restraining order was entered by the Hon. Marvin Frankel of the Southern District of New York on August 4, 1972. That restraining order temporarily set aside HEW's approval of the two projects "to the extent that . . . no action adversely affecting any applicant for or recipient of AFDC may be taken in reliance upon such determination" and further prohibited respondent Lavine "from imposing on any AFDC recipients or the City of New York any sanction, fiscal or otherwise. . . ."

On October 16, 1972, the Hon. Arnold Bauman denied the motion for a preliminary injunction (Appendix A)

but stayed his order vacating the temporary restraining order pending application to the Court of Appeals. On October 24, 1972, the Court of Appeals (Hays, Moore, Mulligan, C.JJ.) denied petitioners' motion for a stay pending appeal, but granted a temporary stay until October 30, 1972 to permit an application to this Court. On October 30, 1972, the Hon. Thurgood Marshall extended that stay pending responsive papers and oral argument on the application and, on November 16, 1972, after considering the said responses (the federal respondents did not oppose the application), and oral argument, he extended the stay theretofore entered pending oral argument of the appeal in the Second Circuit. On December 1, 1972, following submission of the parties' briefs and oral argument, the Court of Appeals (Friendly, Ch. J., Hays, Waterman, C.JJ.) extended the stay pending determination of the appeal. On January 18, 1973, that panel modified, and as modified, affirmed the district court's denial of injunctive relief against implementation of the projects (Appendix B). The Court of Appeals continued the stay pending application by petitioners to this court for a further stay pending review on a petition for a writ of certiorari.

On February 7, 1973, Mr. Justice Marshall again granted an extension of the stay pending further order of this Court. On February 20, this Court denied petitioners' application for a stay.

REASONS FOR GRANTING CERTIORARI

There are three major reasons we believe warrant the issuance of a writ of certiorari in this case. First, the decision below has determined a novel question of constitutional law which should be settled by this Court because

of its broad implications with respect to the development of governmental programs discriminating between citizens on no basis and for no reason other than to select out subjects for experimentation. Second, the court below has decided a novel and important question as to the scope of the Social Security Act with respect to authorization of experimental projects which will have direct and substantial impact on the very subsistence of hundreds of thousands of citizens both in the immediate present and in the years to come. Finally, the decision below establishes a test for judicial review of administrative action in the area of governmental welfare programs which completely rejects the standards enunciated by this Court in *Citizens to Preserve Overton Park* v. *Volpe, supra,* and presages the limitation of that decision to situations involving similar if not identical governmental actions, viz., decisions affecting the physical environment, thereby leaving agency action in the broad realm of "social" programs effectively free of any judicial accountability. Moreover, HEW's action herein falls so far short of the standard for proper administrative action that judicial countenance of such approach can only serve to further embolden the agency in a continuing course of lawless actions, thereby directly injuring the hundreds of thousands of citizens who will be deprived of their rights by such actions and, just as importantly, drastically undermining the development and maintenance of a system of orderly governmental actions undertaken with due cognizance for the obligations as well as the powers of government. Thus the error wrought below calls for this Court's intervention not only to right the still avoidable wrongs which will ensue to the tens of thousands of families directly involved but also to prevent the other-

wise certain recurrence of such harms in the future, harms both to the individuals directly involved and to the very fabric of government.

1.

Equal Protection Claim

A question not heretofore addressed by the judiciary is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, rights and entitlements to public benefits established by a state legislature and by the Congress of the United States, may be taken away from 25% of the beneficiaries of such legislation, who are selected on the basis of their place of residence in the state, *solely* for the purposes of experimentation devised by administrative agencies. Petitioners do not challenge the rationality of the criteria used to determine who is "employable" and hence subject to the PSWOP and IFI work requirements *on that basis.* We challenge the validity of a classification which singles out *only* those recipients who are "employable" under such rules who happen to reside in one of the fourteen selected districts and imposes the PSWOP and IFI requirements on them.

To be sure, geographical discriminations are not *per se* invalid, see, e.g., *San Antonio Independent School District* v. *Rodriguez,* 41 L.W. 4407, 4415, n. 66, 4423, n. 110 (1973), but they are upheld by this Court *only* if a determination can be made that the classification based on place of residence is reasonably related to the purposes of the program within which it is made. See, e.g., *San Antonio Independent School District* v. *Rodriguez, supra; Gray* v. *Sanders,* 372 U.S. 368 (1963); *Gordon* v. *Lance,* 403 U.S.

1, 4 (1971); *Salsburg* v. *Maryland*, 346 U.S. 545, 552 (1954); *Packard* v. *Banton*, 264 U.S. 140, 143-44 (1924). Compare *Griffin* v. *School Board*, 377 U.S. 218, 231 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 656 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962). Place of residence alone is, of course, totally unrelated to financial need, dependence of children, or lack of capability for self support, the relief of which is the stated purpose of the AFDC program, 42 U.S.C. §601, and allegedly, of the experimental projects at issue herein.

If New York had determined to apply a "work-for-relief" or "youth motivation" program in these 14 counties on the basis that in such counties unemployment of welfare recipients is greater, or public agencies are more able to absorb welfare recipients, or day care facilities are more readily available, or that the local welfare agencies are better able to handle the administrative responsibilities of a new program, perhaps the geographical classification would be rational. Cf. 42 U.S.C. §632. Such situations would merely represent examples of the generally accepted rule that a state "may take one step at a time addressing itself to the phase of the problem which seems most acute. . . .", a rule which has been applied in recognition of the fact that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

In the instant case, however, New York has *not* made any such judgment. Indeed, there has been no legislative judgment as to who should be covered by the project or even how such participants should be selected. The state agency proposes to run this experiment in the fourteen counties precisely because they are *typical* of the counties in the

rest of the state in terms of the problems of welfare dependency and the proposed solutions to those problems. "In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious." *Eisenstadt* v. *Baird*, 405 U.S. 438, 454 (1972).

Clearly, therefore, the constitutional issue posed by such classification is at the very least novel. Yet despite this novelty and the obviously broad significance of any decision thereon, the court below engaged in what might best be described as a cursory analysis and disposition of the question as if this were such a well settled point of constitutional decision that any extensive discussion would only be redundant. Unfortunately, this approach itself compounds the effect of the court's error, since it engaged in such a broad sweeping endorsement of the constitutionality of the action at issue as to virtually legitimize any and all discrimination between citizens if done in the name of experimentation.

Faced with the lack of any basis for distinction as between the individuals living in the project areas and those living without, the Court of Appeals looked only to the question of general state purposes rather than the purposes of the particular program and found that the classifications based on residence did rationally serve "a" state purpose. The purpose is "to determine whether and how improvements can be made in the welfare system" (53a), and the classification furthered that purpose since it enabled a "controlled experiment." *Ibid.*[7] This proposition is a star-

[7] Lest there be any doubt that the Court of Appeals based its decision that the Equal Protection Clause was not violated on the conclusion that experimentation is *per se* valid, and that it did *not* determine that the decision by the respondent to impose PSWOP

tling one indeed. Under this rationale a state official could justify *any* burden which he imposed upon a geographic minority of the state's citizens merely by labelling the program or regulation "experimental," and, further, he would have the power to so mandate participation in experiments in any area of legitimate state interest.

Since all social and economic regulation is to some extent "experimental," however, in the sense that we are not sure of positive results, see *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932), the Court of Appeals' rationale, if accepted, would place such broad discretion in the hands of government officials to determine which citizens will suffer the risks of such experimentation as to directly contradict the most basic principles of Equal Protection.[8] As re-

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and IFI requirements *only* on recipients in selected areas of the state reasonably furthered a legitimate purpose of the AFDC program, the characterization of the decision below by another judge of the Circuit a few months later is instructive. In dissenting from a denial of rehearing *en banc*, Judge Timbers declared that "[w]e held [in *Aguayo*] that the New York work project program satisfied the new standard [of equal protection] because *experimentation* to determine whether improvements can be made in the welfare system *is a legitimate government objective*". *Boras* v. *Village of Belle Terre*, —— F. 2d —— (No. 72-2040, 2d Cir. March 16, 1973), denial of rehearing *en banc*, Timbers, C.J. dissenting, April 5, 1973, slip op. at 2699 (emphasis added).

[8] An "experimental project", assuming the requirements of federal regulations have been met, is one "which introduces a new method or approach in an effort to learn whether it is effective." HEW *Handbook of Public Assistance Administration*, Pt. IV, §8432.1. We believe it directly counter to the thrust of the Equal Protection Clause to subject a limited number of a state's citizens to substantial burdens, and deprive them of their otherwise due statutory entitlements, when the "benefits" to be gained or the harms to be suffered are by definition unknown. May New York establish a maximum grant limitation in only fourteen counties in order to test its utility as a work incentive? Cf. *Dandridge* v.

cently observed in *Eisenstadt* v. *Baird, supra,* 405 U.S. at 454, Mr. Justice Jackson's warning in 1949 is still applicable:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency* v. *New York,* 336 U.S. 106, 112-113 (1949).

The Court of Appeals without explanation or rationale exempts the behavioral experiments at issue here from this basic principle solely because they are experiments, and the citizens mandated to participate were allegedly selected by a "random, but rational basis" (53a). Petitioners contend that rather than lessening the state's burden of justification, the fact that these projects are designed as experiments, the state and federal governments being unwilling to burden all recipients with their requirements, imposes a greater burden on the state. Thus, while random selection may be a rational approach to assuring typicality of project participants, it is for this very reason that it runs

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Williams, 397 U.S. 471 (1970) (statewide). Or could New York eliminate preferential tax treatment for investment income in only fourteen counties to test the hypothesis that taxation at ordinary rates will not impede investment incentive?

counter to the existence of a rationally-based differentiation in treatment.[9]

In sum, the Court of Appeals has determined that a different or lesser standard of equal protection is to be applied to welfare experimentation than to other areas of governmental action.[10] Aside from the absence of any authority for such a proposition, even if the court is correct that equal protection does not prohibit such "picking and choosing" amongst similarly situated individuals when the purpose of such selection is welfare experimentation, petitioners contend that equal protection at least demands that the state expose to the risks of the experimentation only that number of persons necessary to conduct a valid experiment. The record in this case demonstrates that the project scope was not so finely tuned, but rather reflected the state's desire to subject as many as possible to the requirements of the projects without regard to the needs of experimentation. The record shows, for example, that *25%* of the state will be subjected to PSWOP despite the fact that only "a *sample* of participating districts" will be evaluated by the consultants hired for this task. Similarly,

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[9] Indeed, the record demonstrates that the selection of citizens was *neither* random *nor* rational. Thus, for example, the IFI application included the Hamilton Welfare Center in Harlem because it had separate personnel doing income maintenance and service functions, and because it was automated (computerized). The project was later modified to substitute the Bay Ridge Center in Brooklyn for the Hamilton Center, and the above criteria were dropped without explanation. (Bay Ridge is neither separated nor automated.)

[10] The court below relies heavily on the fact that this is a *welfare* experiment. "The Equal Protection Clause does not place the state in a vice where its only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action." (53a). See also *id.* at 41a ("the Secretary could properly take into account the growing antagonism to the welfare system").

with respect to IFI, while 8000 families are to be subject to that project, i.e., *2.5%* of the state, only 300 families will be evaluated. Indeed, the very difference between the numbers covered by PSWOP and IFI indicates the lack of relationship between the scope of the projects and the need for a sufficient sample to provide a valid basis for evaluation of the experiment. If 2.5% suffices for the testing of IFI, which contrary to the Court of Appeals' characterization is not merely an "embroidery" on PSWOP (54a, nt. 31), but a set of separate requirements and conditions which could stand or fall independently of the evaluation of PSWOP, there is no apparent reason why a similar sample size is not sufficient for PSWOP. Respondents have offered no explanation of this discrepancy and the Court of Appeals did not even admit that a legally cognizable discrepancy existed lest it be required to then resolve it.

It would seem that a balancing of the state's allegedly "legitimate" interest in seeking improvements in the welfare system by compulsory experimentation, and of the recipients' vital interest in the continuation of their statutorily prescribed assistance benefits, would compel that finer lines be drawn. Cf. *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972). The court below merely presumed the rationality of the universe selected for the experiment, e.g., (54a, nt. 31), and ignored the undisputed evidence to the contrary.

2.

Interpretation of §1115

A second major issue is the proper interpretation and scope to be given to §1115 of the Social Security Act, 42 U.S.C. §1315. First, since 1962 when §1115 was added to the Act, it has undergone judicial construction only in the instant case and one other case. [*CWRO* v. *Richardson,* 348 F. Supp. 491 (N.D. Calif., 1972).] This case is the only one to reach appellate review. Second, §1115 is a statute with enormous implications. Drawn in broad terms, it purports to authorize an official of the Executive Branch to waive Congressionally-imposed restrictions on a multi-billion dollar grant-in-aid program. It is therefore of potential applicability in fifty-four separate jurisdictions, affecting millions of beneficiaries of five separate programs (Old Age Assistance, Aid to the Blind, Aid to the Permanently and Totally Disabled, Aid to Families with Dependent Children and Medical Assistance). Moreover, current implementation of the section differs markedly from its previous ten year history of administration, particularly in the authorization of experiments such as the instant ones which present fundamental departures from the basic Congressional welfare scheme in effect since 1935. And as noted above, the Secretary of HEW has made it clear that he not only intends to continue on his present course, but plans to increase and expand such section to further curtail any congressionally established "federal limits" on state action in the welfare programs. See *Press Conference,* Caspar Weinberger, *supra.*

The particular questions of statutory construction presented are as follows:

(a) *Denial of statutory entitlements*: Petitioners contend that §1115 does not authorize approval of experimental projects which substantially deprive welfare recipients of rights and entitlements guaranteed to them by other provisions of the Social Security Act by imposing conditions on their receipt of assistance which could not lawfully be imposed under such Act. It is our position that Congress would not have authorized such a fundamental departure from the basic principle that assistance must be provided to *all* eligible individuals under federal standards, e.g., *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *King* v. *Smith*, 392 U.S. 309 (1968), without either an express statutory indication of such intent, or an explicit recognition of this possibility in the legislative history.[11] See *Rosado* v. *Wyman*, 397 U.S. 397, 414, n. 17 (1970).

Quite to the contrary, petitioners have pointed to legislative history which indicates that the members of the Administration which asked for, drafted, and received, the §1115 authority described it *to the Congress* as limited to projects designed to improve "techniques of administration", and that the *Congress itself characterized* the effect of the provision in very limited terms with absolutely no

[11] It is to be noted that the Court of Appeals' treatment of this question suggests that there is a distinction between the imposition of additional conditions which, although they will substantially burden all, will only cause a monetary loss to those who do not meet them, and a mandated reduction of benefits for all. (43a nt. 24.) Obviously this is a distinction which is untenable in light of *Townsend*, *Carleson*, and *King*. In any case, that court's interpretation of §1115 permits an experiment which would have the effect of denying benefits to all recipients without regard to compliance with project "conditions." Indeed, the reduced income exemption for IFI participants is such an experiment, for such persons lose benefits even while complying with all project requirements.

indication that it perceived the section as a device to take away substantial rights that it had previously granted. See *Rosado, supra,* 397 U.S. at 414, n. 17. Moreover, the undisputed history of operation under §1115 for some 10 years from its original enactment to the present, during which over 400 projects were approved, none of which reduced beneficiaries' entitlements, supports petitioners' interpretation.

Furthermore, we submit that the Court of Appeals' rationalization that §1115 permits substantial diminutions of federally guaranteed rights because "the only limitation imposed on the Secretary [is] that he must judge the project to be 'likely to assist in promoting the objectives' of the designated parts of the . . . Act" (44a), begs the question. It is the very inconsistency between promotion of the objectives of the Act and the diminution of the statutory entitlements established by that Act which calls for our interpretation of §1115. It is our interpretation alone which gives meaning *both* to the authorization for waiver in §1115(a) and to the requirement that such waiver be granted only to enable the carrying out of a project likely to promote the objectives of §1115. The interpretation posited by the appellate court herein, which amounts to a finding that such section permits administrative abrogation of statutorily created rights without providing any clearly delineated legislative standards for the exercise of such "unfettered judgment" (48a), raises serious constitutional questions with respect to the scope of the legislative delegation and thus should be avoided.

(b) *Conflict with Specific Congressional Action*: Plaintiffs contend that §1115 does not authorize HEW in the guise of "experimentation" to authorize a state to carry

on a work for relief program when such programs have been previously tested and evaluated pursuant to a specific congressional authorization therefor, and have been specifically rejected by the Congress after consideration of their results. This period of testing was conducted under §409 of the Act, 42 U.S.C. §609, which was enacted in 1962 and continued in effect until 1968 when Congress abolished such authorization after receiving and considering the evaluations which it had required. P.L. 87-543, §§101(b)(1)(E), 105, 87th Cong., 2nd Sess. (1962); P.L. 90-248, §204(c)(2), 90th Cong., 1st Sess. (1968). Testing an activity which has been oft-tried, evaluated and rejected by the Congress is hardly experimental in anyone's sense of the word, much less an activity which offers any likelihood of promoting the congressional objectives.[12]

Indeed, authorization of such program is a fundamental departure from the basic congressional scheme for AFDC, tantamount to a rewriting of such program. From 1935 until 1962 when Congress authorized testing of work relief under §409, it consistently maintained that a system of work relief was alien to the approach it had adopted for the federal public assistance programs, i.e., the "money payment" or income maintenance approach, §406(b) of the Act, 42 U.S.C. §606(b). And it not only reaffirmed its original rejection thereof, first in 1968, and only recently again in 1972,[13] but also affirmatively determined that work and training programs for AFDC recipients should be con-

[12] As noted above, HEW's own definition of an "experimental project" requires novelty and original study. See nt. 8, p. 20.

[13] A proposal to reinstate §409 was made in connection with the recently passed "Social Security Amendments of 1972". It was rejected. See Conf. Rep. No. 92-1605 on H. R. 1, 92nd Cong. 2d Sess. (1972), at p. 29, rejecting Senate Amendment No. 567 which would have repealed the repeal of §409.

ducted in a manner to put them on a par with the rest of the population both during and after their participation in such program. Thus through WIN it provided for a program of bona fide training where needed and for opportunities to enter into regular wage-paying jobs with the full status of an employee (with supplementary assistance available if needed to fill any gap between earned income and the standard of need). See generally, Brief *Amici Curiae* of NWRO *et al., New York State Department of Social Services* v. *Dublino,* O.T. 1972, No. 72-792, pp. 16-39.

The Court of Appeals failed to perceive and accurately assess the scope of this departure because it arrived at a totally erroneous conception of the objectives of the AFDC program. For one, the court "found" that Congress had indicated basic acceptance of work for relief in the AFDC program from the outset by its enactment of §409 in *1935!* (42a) It then found further evidence of the consistency of the projects with congressional objectives in the "fact" that "WIN . . . is a *work relief program* virtually identical in scope and design to . . . PSWOP" (42a-43a).

In light of the true facts, however, there can be no question that the use of §1115 to permit states to require AFDC recipients to "work off" their assistance payments in the face of explicit congressional action to the contrary is the accomplishment by executive fiat of the substitution of another radically different program for the one intended by Congress. There is neither reason nor authority to suggest that Congress intended to confer such "legislative power" on the Secretary. Indeed, there is serious question as to whether such an authorization if intended would be constitutionally valid.

3.

The Standard of Review to Be Applied to "Informal" Agency Decisions

Petitioners contend that the materials before the Court of Appeals demonstrated that the Secretary did not make those judgments and determinations required for an exercise of his authority under §1115 before issuance of his approval of June 1, and that he otherwise failed to act in accordance with law, and that under the standards set down in *Citizens to Preserve Overton Park* v. *Volpe, supra,* his action must be set aside.[14] However, the Court of Appeals, determined not to hold the Secretary to the standard for administrative action set down in *Overton,* because it considered that greater latitude should be allowed an administrator when he is acting on a program that is only "avowedly experimental [with] . . . a fixed termination date" albeit an experiment affecting the "lives of thousands of people" rather than an "irreversible" step such as building a highway (40a-41a), especially when this program is in the "welfare" area (41a). The court therefore fashioned a different and less stringent test to be applied in the "welfare" area, a test under which the validity of administrative

[14] Although petitioners believe that the materials before the court, as scant as they are, constitute the full administrative record which was before the Secretary when he acted on June 1, the federal defendants advised the Court of Appeals at oral argument that it did not have the complete record. In any case, the only evidence of such administrative record before the court consisted of two HEW Action Memoranda submitted to the Secretary on May 31 and the attachments thereto. Contrary to the inference which might be drawn from the Court of Appeals' description of the record before it (40a) no affidavits nor any other testimonial statements were submitted by the federal defendants.

action is to be presumed from the fact of its exercise, absent a Secretarial admission to the contrary. (It is noteworthy that the approach followed by the court below is strikingly similar to that followed by the Court of Appeals for the Sixth Circuit in *Overton,* 432 F.2d 1307 (1970).)

Petitioners contend that the scope of inquiry required by §706 of the APA and by this Court's decision in *Overton* is the same for decisions in the welfare program as it is for those made in the highway program, and that a decision is no less arbitrary, unlawful, or in excess of statutory authority simply because its effects will last for a predetermined fixed period of time as opposed to an indeterminate period. (Indeed, semanticists might well argue as to whether an activity designed and calculated primarily to produce a direct effect on human beings is more or less "irreversible" than the destruction of parkland.) Furthermore, applying the *Overton* test to the record before the court, it is insufficient to support the Secretary's action. We submit that absent this Court's review of the Court of Appeals' decision, the salutary purpose which this Court sought to achieve by its review and decision in *Overton* is vitiated so far as administration of the welfare statutes of the United States is concerned, if not for all practical purposes in all programs.

The questions which will be raised include: (a) *Requirement of affirmative judgment.* We contend that under §1115 the Secretary is not authorized to approve implementation of an experimental project before affirmatively satisfying himself of its being "likely to assist in promoting the objectives of" the Act and that no such affirmative decision was made before issuance of the June 1, 1972 approval at

issue herein. The Court of Appeals admitted as much, finding that HEW's pre-approval memorandum of May 31, 1972 "detail[ed] certain *necessary information still lacking* from New York" (emphasis added), information which HEW had been requesting since at least November 24, 1971, and that the Secretary while purporting to approve the projects on June 1, required such further information to be submitted for review prior to project implementation (28a-30a). This additional information is material which goes to the very heart of the projects and their effect on individual families, and without which the Secretary could not reasonably have determined how and whether the projects would promote the Act's objectives.

The court's findings on this point alone should have sufficed for a holding that the June 1 approval was invalid since surely §1115 requires an affirmative, if informal, finding of acceptability, not a presumption of acceptability subject to a subsequent reevaluation. Authority to proceed under §1115 is a serious matter; duly enacted federal regulation is waived thereby. Congress did not intend that projects would be acceptable and implemented subject only to a subsequent review which may or may not be completed during the project's life. Rather, it specified that *only* those projects which meet the requisite standards may be approved.

However, the court made the necessary determination of project acceptability for the Secretary by rejecting his own determination as to the need for further materials before reaching a final decision. Thus it held that "the material furnished by the State in justifying the programs and applying for approval adequately covered the . . .

essentials, and [§1115] . . . does not require that, before the Secretary approves, every i must be dotted and every t crossed" (48a). See also at 47a, "the materials . . . sufficed." Surely there can be no clearer case of a court substituting its judgment for that of the Secretary albeit for the reverse of the usual reason for such error.[15]

(b) *Failure to consider all relevant factors.* Faced with a record which could not support a finding that the Secretary had in fact considered all relevant factors and indeed which affirmatively indicated that he had not, the court below simply chose to ignore the direction in *Overton* that it conduct a "searching and careful inquiry into the facts" to determine whether all relevant factors *had in fact been considered by the Secretary.* It determined instead that the proper test should be whether the Secretary *might* possibly have considered all the relevant factors assuming that he was aware of and considered all the matters hinted at by the materials in the administrative record. Thus the court substituted presumption for inquiry, upholding the Secretary's decision on a finding that "the materials before the Secretary *sufficed* for a consideration of the relevant factors by him" (47a) (emphasis added), not that he had in fact considered such factors.

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[15] As noted in the court's decision, further materials were submitted by the state on June 14 and June 27. However, there is no question that the only administrative decision before the court, in the court's own view, was that made by the Secretary on June 1. Further, as noted by the Court of Appeals, there is no evidence of any subsequent decision ever having been made. See, e.g., 30a. Indeed, the Court of Appeals itself took care to provide, *sua sponte,* for the meeting of *all* work-related expenses, one of the June 1 requirements, after noting that the project procedures submitted to HEW after June 1 were deficient with respect to this item. See 24a, n. 4.

This use of presumption is doubly remarkable for not only is it an obvious departure from the proper standard of judicial review but it also flies in the face of the court's own findings, including those discussed in (a) above, as to an absence of information on, or consideration of, certain relevant points. For example, petitioners had also pointed to the absence of any Secretarial consideration of, much less decision on, the question of whether the state and local agencies had the ability to carry out the projects, including the ability to do so without interference with performance of any of the other duties of these agencies, and to the fact that a determination of such ability was clearly required by HEW's own regulations. Indeed, the evidence before the court indicated that if the Secretary had considered the matter he would have had to arrive at a negative conclusion, since it included a letter from HEW to New York indicating that prior to June 1 HEW had concluded there was a serious problem because of inadequacies in staffing and training with respect to the City's failure to promptly process regular applications and take proper case actions in a substantial number of cases in the regular programs (Doc. 15). This letter (dated August 16, 1972) stated this problem was still outstanding and requested that some steps be taken to improve the situation. Moreover, the Assistant Administrator, Research and Demonstrations, had admitted on July 21, that the question of the agencies' capability to perform effectively "was not an issue at the time of project approval" (Doc. 9, Ex. D).

To permit agencies to undertake the implementation of additional and complex special tests without considering their ability to continue to function under such workload is at least irresponsible; to do so in the face of evidence of

imminent breakdown is well-nigh malfeasance. Certainly there was no basis for upholding the Secretary's action unless he could offer some evidence to demonstrate that he had in fact inquired into this question, that this inquiry had taken into account HEW's own negative evidence on this point as well as any evidence adduced supporting a finding of capability, and that he had reached an affirmative decision on this point which was not arbitrary in the light of the evidence.

At first blush, the court's resolution of this matter appears to simply be a departure from *Overton* in line with its general substitution of presumption for inquiry—"HEW . . . demanded assurances of the State's capacity to perform [the projects], with which it was *presumably satisfied*[28]" (emphasis added) (49a). However, its next words not only contradict this statement but show that it actually freed HEW from the need to consider any relevant facts if they would be inconvenient—"[federal] defendants have not *unreasonably deviated* from their own rules" by failing to follow "a provision in HEW's Handbook . . . directing . . . 'apprais[al] [of] the *ability of the* [*applicant*] *agency* to provide for methods or organization, administration, and staffing which holds reasonable promise of *carrying out the project effectively*" (emphasis added) (49a, nt. 28).[16]

Similarly the record before the court lacked any evidence that the Secretary had been fully cognizant of the extent of the differences between these projects and WIN, the

[16] With respect to those factors which a welfare official does choose to consider, the court has freed him from the command of *Overton* that he look to the real world in making his statutorily prescribed determinations, allowing him instead to close his eyes to any facts or information other than that submitted to him by the supplicants for his approval (—a, nt. 27).

work and training program established by Congress. 42 U.S.C. §§602(a)(19), 630, *et seq.* Indeed, as discussed below, the record demonstrated that the Secretary had not granted a waiver of §402(a)(19) and this in itself gives positive evidence that he had not recognized the conflict between the projects and WIN. Certainly no reasonable judgment could be reached as to whether the projects would promote the objectives of the Act without understanding exactly how the approach to work and training therein differed from that adopted by the Congress.

For example, how could one assess the potential effects of the projects without considering the significance of the absence of almost all the important protections for recipients built into the federal work program, such as hearings at all stages prior to being subjected to the various work requirements, the 60 day counseling period prior to imposition of sanctions for non-cooperation, or the extensive policies and standards established by the Secretary of Labor for use in the WIN agency's determination of the employment potential of a particular individual and of the appropriateness of a particular work or training placement, or, indeed, the use of trained manpower staff for the employability and employment determination? Indeed without understanding the differences one could not even determine whether operation of these projects would interfere with the performance of the state and local agencies' mandated duties under WIN, surely a relevant consideration in determining whether such projects should be approved. Furthermore, the record was even devoid of any evidence that the Secretary had ever been aware of, much less considered the fact that Congress had specifically rejected work relief programs after providing for a test thereof from 1962-1967 under §409.

The court below, however, again refusing to look at the facts before it and refusing to hold the Secretary to any reasonable standard of action, held that it was sufficient that the federal respondents were "aware" that PSWOP and IFI differed "in some respects from WIN" (51a). Obviously application of such a standard precludes any meaningful review of the Secretary's action since there will always be some evidence from which one can infer that the administrative official had some "awareness" of what was involved in the matter before him for decision.

In short, the Court of Appeals has established a standard under which welfare decisions are immune from judicial review. It has told federal welfare officials that they do not have to act in an orderly and reasoned manner.

(c) *The Secretary's failure to act in accordance with the terms of §1115.* Under the terms of §1115, the Secretary may authorize action inconsistent with one of the requirements of §402 to the extent that he "waive[s] compliance with . . . [that] requirement." As noted above, the Secretary did not provide for waiver of §402(a)(19) in his approval of these projects. Petitioners contend that such provision bars the state from establishing any compulsory work program other than WIN, and therefore that the Secretary's purported approval of these projects without recognizing the conflict with §402(a)(19) and providing for waiver thereof is not in accordance with §1115.

Indeed, the instant case presents the same issue as that pending before this court in *New York State Department of Social Services* v. *Dublino, sub judice,* O.T. 1972, No. 72-792, and *Onondaga County Department of Social Services* v. *Dublino, sub judice,* O.T. 1972, No. 72-802. This reason

alone makes this case worthy of *certiorari* and justifies the granting of this petition. If this Court determines that §402(a)(19), which requires each state to provide for the registration of non-exempt AFDC recipients for the federal Work Incentive Program (WIN), and the certification to the Secretary of Labor[17] of those registered recipients who have been found after individual appraisal by the Secretary to be ready to be placed in regular jobs or training programs by him, bars state welfare departments from establishing any other compulsory state-run work programs for AFDC recipients, the decision of the Court of Appeals herein would have to be reversed, since *respondent Richardson did not waive §402(a)(19) with respect to either project in this case.* Having failed to waive §402(a)(19), that section operates with as much force and effect in the case of PSWOP and IFI as it did in the case of New York's statewide work rules enjoined in *Dublino,* and since PSWOP and IFI are inconsistent with the federal statute, they must give way to that statute under the Supremacy Clause.

The Court of Appeals accepted the fact of non-waiver and purported to accept petitioners' contention as to the effect of §402(a)(19). However, it nonetheless upheld the Secretary's approval as a proper exercise of his authority under §1115 holding that it would "elevate form over substance" to require the Secretary to act on such waiver since

[17] In New York State the Secretary of Labor has contracted with the State Employment Service of the New York State Department of Labor for the performance of his functions under the WIN program. Pursuant to that agreement, a special WIN division of the State Employment Service has been established to provide the various manpower services which the Secretary of Labor is required to provide under the WIN program. The regulations and procedures governing the WIN division of the State Employment Service are established by the Secretary of Labor.

"it [was] clear, both from the entire context and from specific references in the materials before him, that . . . the Secretary [was] well aware that the [projects] differed in some respects from WIN." (51a). (Compare the decision of the Sixth Circuit in *Overton*, 432 F.2d at 1313.) Of course, the court could not explain why the Secretary had not provided for the necessary waivers if he was so aware of the problem.

In any case, this conclusion totally vitiates the existence of any standard for Secretarial action under §1115. The Secretary is free to approve in generalities without specifically dealing with the question of what waivers are required and proper under §1115(a). The Congressional scheme for project approval requires specific identification of the inconsistencies between project proposals and the statute and particularized judgment as to whether and the extent to which a particular inconsistency should be permitted. This whole system falls if the Secretary need not specify the waivers which are or are not granted and if his approval of such inconsistencies is to be inferred merely from the fact of an undetailed "approval." Shall the courts at the behest of those subject to projects speculate endlessly as to whether a particular unmentioned conflict was nonetheless recognized or merely overlooked? Even more importantly, if the Secretary's action is to be validated by §1115 even though he has not followed the requirements for action prescribed therein, he is accountable to neither courts nor legislature, nor indeed is there any way in which Congress can grant limited powers.

Furthermore, the court's conclusion is not only erroneous as to the standard for Secretarial action, but proceeds from its erroneous judgment that the deviations were "de mini-

mis" and therefore did not require specific Secretarial attention. These errors in themselves if allowed to stand portend even more serious distortions of the Social Security Act in the future since they consist of erroneous interpretations of the fundamental purposes of the Act. Thus the court holds: (1) that the 1935 Act was intended to have single parents function as "breadwinners" wherever possible (including the somewhat incredible error of attributing enactment of §409 to the 1935 Act and positing some 30 years of operations thereunder) (42a), and (2) despite its contrary finding that the Secretary was aware of the inconsistencies between the projects and WIN, that "the WIN program is a *work-relief* program virtually identical in scope and design to New York's PSWOP" (42a).

In refutation of the Court's interpretation of the original program purposes one need only look to the actual words of those who drafted and enacted this legislation in 1935. The original Administration proposal for AFDC defined "dependent child" to mean

> "children under the age of sixteen in their own homes, in which there is no adult person, other than one needed to care for the child or children, who is able to work and provide the family with a reasonable subsistence compatible with decency and health." H.R. 4120, 74th Cong., 1st Sess. (1935), §203 of the proposed "Economic Security Act."

After modifications in the House which would have liberalized the test to include needy intact families (i.e., two parents in the home), the Senate returned to the original proposal by amending §406 to limit the definition of "dependent child" to one who "has been deprived of parental support or care by reason of the death, continued absence

from the home or physical or mental incapacity of a parent." The Senate specifically described the beneficiaries of its proposal as "the children in families which have been deprived of a father's support and in which there is no other adult than one who is needed for the care of the children." S. Rep. No. 628, 74 Cong., 1st Sess. (1935), p. 17.

Thus, as succinctly stated by this Court in *King* v. *Smith*, 392 U.S. at 328 (one of the very pages relied on by the Court of Appeals):

> "the Senate Committee Report [S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935)] stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' Ibid. Implicit in this statement is the assumption that children would in fact be supported by the family 'breadwinner.'
>
> The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners."

The court's second error necessarily demonstrates either a complete misunderstanding of the nature of the WIN program and the significance of its overall scheme or a failure to understand what the projects are all about. Thus the court failed to perceive the fundamental difference between a work-relief project such as PSWOP in which an individual "works off" a grant, and the job placement under WIN in which the individual must be placed in an employment situation in which he or she receives wages and is otherwise treated the same as all other individuals performing comparable work for the employing agency. Moreover, it failed to recognize the significance of Congress' having reached a specific determination as to the type of work and

training program consistent with AFDC, and as to the procedures which were to be used and the agencies which were to supervise and operate such program, including one of the most fundamental features of WIN, placement of direct operating supervision in a *federal manpower* agency.

Clearly, the court's misconstruction of the program purposes blinded it to the importance of the procedures and safeguards carefully established in the WIN program to protect against a system of work-referrals which did not give paramount importance to the maintenance of family life, and it was this lack of regard for the WIN structure which led it to seek a way to refrain from having to require the Secretary to make specific decisions as to the inconsistencies between these programs. However, whatever one might think as to what the Secretary would now do if confronted with the need to make a determination as to whether to waive §402(a)(19) and if so the extent thereof, it is clear that (a) his failure to do so when approving the projects, (b) the lack of any explicit recognition or cataloging of the inconsistencies between the projects and §402(a)(19), and (c) his clear knowledge of the procedures required as demonstrated by the careful listing of the waivers granted and of their extent, belies any reasonable inference that he was fully aware of such inconsistencies and intended a total waiver of §402(a)(19). Moreover, this is not a conflict related to minor or peripheral aspects of the project—the desire to act inconsistently with WIN is what the projects are all about. The court simply refused to hold HEW to acting in accordance with law in the administration of the welfare programs.

* * * * *

In sum, on all of the above points, the court substituted its judgment for that of the Secretary in order to avoid

any inquiry into the question of whether when he approved on June 1, he had made the required judgment after having first considered all the relevant factors and having followed all the procedural requirements prescribed by the statute and his own regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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